

# THE WORLD INTERMEDIARY LIABILITY MAP (WILMAP): CHARTING THE ONLINE INTERMEDIARY LIABILITY CONUNDRUM

Giancarlo F. Frosio

## ABSTRACT

*Whether and when access providers and communications platforms like Google, Twitter and Facebook are liable for their users' online activities is a key factor that effects innovation and free speech. There are emerging legal, policy and ethical issues facing online intermediaries. Unfortunately, with globalized online service providers operating across the world in an interdependent digital environment, inconsistencies across different regimes generate legal uncertainties that undermine both users' rights and business opportunities. To better understand the heterogeneity of the international online intermediary liability regime, at Stanford CIS, with the collaboration of an amazing team of contributors across five continents, I have developed and launched the World Intermediary Liability Map (WILMap), a detailed English-language resource comprised of case law, statutes, and proposed laws related to intermediary liability worldwide. Since its launch in July 2014, the WILMap has been steadily and rapidly growing. Today, the WILMap covers almost one hundred jurisdictions in Africa, Asia, the Caribbean, Europe, Latin America, North America and Oceania.*

*Mapping online intermediary liability worldwide serves the goal of understanding responsibilities that OSPs bear in contemporary information societies. After introducing the WILMap—and the surrounding landscape of recent projects related to intermediary liability—this paper aims at discussing advancement in intermediary liability theory and describing emerging regulatory trends. Mapping online intermediary liability worldwide entails the review of a wide-ranging topic, stretching into many different areas of law and domain-specific solutions. The WILMap has become a privileged venue to observe emerging trends in Internet jurisdiction and innovation regulation, enforcement strategies dealing with intermediate liability for copyright, trademark, and privacy (right to be forgotten) infringement, and Internet platforms' obligations and liabilities for defamation, hate and dangerous speech.*

*Thanks to the data set collected in the WILMap, I move to identify and discuss recent trends in intermediary liability policy. There is an increasing number of cracks that appear in safe harbour arrangements for online intermediaries—such as proposed reforms for the introduction of a “duty of care” or “notice and stay-down” regimes as part of the European Digital Single Market Strategy. Increased intermediary accountability has become a globalized trend that has been emerging in Europe, Asia, South America, Africa and Australia. Multiple jurisdictions are trying to cope with “right to be forgotten” demands, following the landmark Google Spain decision of the European Court of Justice. Online intermediaries are not only held liable for IP, privacy or defamation infringements, but are also held responsible for state security. Several*

*countries, such as Russia, Turkey, China, Malaysia or Vietnam, enlist private business in the enforcement of state controls over the Internet.*

*In the same vein, I consider recent case law imposing proactive monitor obligations on intermediaries—such as Delfi decided by the ECHR, Allostreaming in France, the Max Mosely case in multiple European jurisdictions, Dafrá in Brazil, RapidShare in Germany, or Baidu in China. These cases uphold proactive monitoring across the entire spectrum of intermediary liability subject matters: intellectual property, privacy, defamation, and hate/dangerous speech. In this context, notable exceptions—such as the landmark Belén case in Argentina—highlight also a fragmented international response to intermediary liability.*

*Next, I look into blocking orders against innocent third parties as an additional relevant trend in intermediary liability. Blocking orders have become increasingly popular in Europe, especially to contrast online copyright—and recently also trademark—infringement. However, they have been widely used also in other jurisdictions, in particular by administrative authorities and in connection with amorphous notions of public order, defamation, and morality. In this respect, the emergence of administrative enforcement of intermediary liability online appears another well-marked trend in recent internet governance. Multiple administrative bodies—such as AGCOM in Italy, Roscomnadzor in Russia, TIB in Turkey, KCSC in South Korea—have been put in charge of enforcing a miscellaneous array of online infringements—primarily against intermediaries and absent any judicial supervision.*

*Finally, I discuss core trends, such as voluntary and private censorship of allegedly illegal content online—shifting the discourse from intermediary liability to intermediary responsibility or accountability—and extra-territorial enforcement of intermediaries' obligations. Extra-territorial enforcement—recently on the rise and making the headlines for the worldwide enforcement of the “right to be forgotten” by the French CNiL—might potentially break the Internet. It is telling of a disconnection between physical and digital governance of information and content that will hardly go away, at least for some time. However, there are counter-posing forces at work in the present internet governance struggle. A centripetal move towards digital constitutionalism and free trade agreements imposing common DMCA-like intermediary liability regimes alleviates the centrifugal effects of the platform responsibility discourse and extra-territorial enforcement fragmenting the Internet.*